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MEMORANDUM OF LAW

DATE: February 20, 2001

TO: Councilmember Scott Peters

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Related to Park and Recreation Projects on City Council Dockets of February 20, 2001 and February 26, 2001

INTRODUCTION

You have asked the City Attorney's Office to determine whether a conflict of interest would be created by your participation in two upcoming Council decisions involving the funding of Park and Recreation facilities renovation projects. The potential conflict involves your wife's ownership interest in a company that manufactures playground equipment. For the reasons set forth below, you do not have a conflict of interest which would disqualify you from participating in these upcoming decisions.

BACKGROUND FACTS

Your wife has an ownership interest of approximately 11% in the Miracle Recreation Company, a Missouri company which designs, manufactures, and sells playground equipment. This interest is a separate property interest arising from your wife's interest in a separate property trust. The trust owns stock in a company called Playpower, Inc. Playpower is a holding company with several operating subsidiaries, one of which is Miracle Recreation.

The City has used Miracle Recreation equipment in some of its facilities, and has acquired products from the company both directly, in the case of replacement parts, and indirectly, through a general contractor, in the case of construction and renovation projects. Miracle Recreation does not install playground equipment, and does not have a general contractor's license, therefore, it does not directly bid on City playground construction and

renovation projects, and does not have any contractual relationship with the City when it provides materials for such projects.

The February 20, 2001 Council Docket includes an item seeking to add four Park and Recreation Department projects in Council District 6 to the Fiscal Year 2001 Capital Improvement Program budget. Of the four projects, two are "tot lot" renovations. Additionally, the City Council docket of February 26, 2001 includes a similar item involving five park projects in Council Districts 2, 6, 7, and 8. Two of the five projects are tot lot renovation projects. The two Council items are for the purpose of approving funding for the projects only, neither item involves the award of any contracts.

According to Project Officer Deborah Sharpe of the Park and Recreation Department, no design work or contractor selection process has commenced for any of these projects. The tot lot projects are renovation projects which will involve replacement of all the existing equipment. These projects do not require the matching of any equipment with a sole source brand, and there are no facts that Ms. Sharpe is aware of that make it more likely that Miracle Recreation brand equipment will be used in these projects instead of another brand of equipment. There are no facts at this time to indicate which general contractors will ultimately be selected as the contractors for the projects. None of the projects which are included in the two Council actions involve a cost of \$1,000,000 or more, therefore, any future contracts for these projects will be approved by the City Manager pursuant to San Diego Municipal Code section 22.3102(b).

ANALYSIS

The conflict of interest authorities relevant to this situation are the Political Reform Act of 1974, Government Code section 1090, and Council Policy 000-4.

I. Political Reform Act of 1974

The Political Reform Act of 1974 [Act], codified at California Government Code sections 81000-91015, was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov't Code § 81001.

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the economic interests delineated in California Government Code section 87103. Those interests are investments in business entities; interests in real property, income received in the previous twelve months, positions in business entities, and gifts received in the previous twelve months. Investments, income, and gifts must meet threshold dollar values set by the Act before they become potential sources of disqualification. Cal. Gov't Code § 87103.

As a Councilmember, you are considered a public official within the meaning of the Act. Cal. Code Regs. tit. 2, § 18701(a). The Act prohibits an official with a disqualifying conflict of interest from making, participating in making, or using his or her official position to attempt to influence, a governmental decision. This standard prohibits participation in discussions regarding the decision, in addition to voting on the decision, if an official has a disqualifying financial interest. Therefore, whenever you vote on playground renovation projects requiring Council approval, or participate in any discussions about these matters, your actions will be covered by the Act.

Based on your wife's ownership interest in Miracle Recreation, you potentially have several different categories of economic interests, including a direct or indirect investment in a business entity; a source of income; and, a personal financial effect (which includes an increase or decrease in your personal expenses, income, assets or liabilities). For purposes of the Act, it is irrelevant that your wife's interest in Miracle Recreation is a separate property interest. Under the Act, a public official is considered to have an economic interest in any investment interest of his or her spouse, even when the investment is held as separate property. *In re Ryan*, FPPC Priv. Adv. Ltr. A-99-027; *In re Johns*, FPPC Priv. Adv. Ltr. A-92-657.

For each of the economic interests identified above, it is necessary to determine if a material financial effect is "reasonably foreseeable" as a result of the governmental decision in question.

The Fair Political Practices Commission [FPPC] has written that a financial effect need not be a certainty to be considered reasonably foreseeable, but that a "substantial likelihood" is necessary to meet that standard. *In re Thorner*, 1 FPPC Ops. 198 (1975). The FPPC has also stated in several advice letters that in the earlier stages of a project or process, there is less likely to be a substantial likelihood of a material financial effect than in the later stages of a project. *In re Biondo*, FPPC Inf. Adv. Ltr. I-90-071; *In re Ragghianti*, FPPC Inf. Adv. Ltr. I-98-064. In a situation similar to the one at issue, the FPPC advised a council member who owned a steel business that although a land use decision would allow development which would increase the local demand for steel, a financial effect on his particular business was not reasonably foreseeable, because it had no known connection to the project. *In re Guinan*, FPPC Priv. Adv. Ltr. A-94-047.

Applying that standard to the Park and Recreation projects at issue, there is no reasonable foreseeability that the funding decisions for these projects will have a financial effect on you, your wife, or Miracle Recreation. These projects are at a very early stage, no design work has been done for the projects, and no competitive contracting process has commenced to select the general contractors for the project. At this time, there is no known connection between Miracle Recreation and these projects. Therefore, there is no reasonably foreseeable financial

effect on you, your wife, or Miracle Recreation, and you are not disqualified from participating in the decision to fund the projects.¹

2. Government Code section 1090

Government Code section 1090 [Section 1090] precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. Although the term “financial interest” is not specifically defined in the statute, an examination of the case law and the statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. *Thomson v. Call*, 38 Cal. 3d 633, 645 (1985). An official is considered to be participating in the making of a contract for purposes of Section 1090 when he or she is involved in any preliminary discussions, negotiations, compromises, planning, and solicitation of bids for government contracts. *Millbrae Ass’n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222 (1968).

Any contract that is entered into in violation of Section 1090 is void and unenforceable. Additionally, an official who violates Section 1090 may be subject to criminal, civil, and administrative penalties. Potential conflicts under Section 1090 can be especially problematic because an official who is a member of a board which executes a contract is presumed to be involved in the making of the contract. *Thomson v. Call*, 38 Cal. 3d 633. This presumption has been applied in some cases even when the official abstained from voting. *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201 (1977).

The Council decisions at issue involving renovation or construction of City playgrounds will eventually involve the making of a contract for each project, subject to the approval of the City Manager. Because “making of a contract” is construed liberally for purposes of Section 1090, and encompasses planning, negotiating and other matters preliminary to the actual execution of a contract, these pending decisions will be analyzed under Section 1090 as well as the Political Reform Act, in an abundance of caution.

Although there are no California cases interpreting Section 1090 which are exactly like the fact situation at issue, there is one line of cases which is helpful by analogy. In these cases, a government agency entered into a contract with a general contractor, and after the contract award, the contractor procured materials from a material supplier in which an official had an economic interest. *Escondido Lumber v. Baldwin*, 2 Cal. App. 606 (1906); *People v. Deysher*, 2 Cal. 2d

¹Because there is no reasonable foreseeability of any financial effect on you, your wife or Miracle Recreation at this time as a result of the decision to fund these projects, it is not necessary for purposes of this analysis to determine the amount of financial effect which would constitute a material effect on your economic interests for purposes of disqualification.

141 (1934); *City Council of San Diego v. McKinley*, 80 Cal. App. 3d 204 (1978). In the *Escondido* case, a school district contracted with a general contractor to construct a schoolhouse. After the execution of the contract, the contractor purchased lumber from a corporation in which one of the school board members had an economic interest. The court held that “[t]he mere fact that the contractor, without previous arrangement or agreement, saw fit to buy of a corporation for which one of the trustees was an agent certain materials used in the construction of the house would not render the contract void.” *Escondido Lumber v. Baldwin*, 2 Cal. App. at 608.

With the Park and Recreation projects at issue, there is even less of a factual basis for finding a disqualifying conflict of interest under Section 1090 than in the cases cited above. In this situation, the projects are at such an early stage that it is unknown who the general contractors for the projects will be. Additionally, there is no way of knowing at this stage of the projects if any of the potential contractors for the projects will procure materials from Miracle Recreation Company. Therefore, at this stage of the projects, there is no disqualifying financial interest which can be identified for purposes of Section 1090, and you are not legally precluded from participating in the decisions to fund the projects.

3. Council Policy 000-4

San Diego City Council Policy 000-4 states in pertinent part:

No elected official . . . of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

Under this policy, it is each official’s responsibility to determine whether he or she has any interest, financial or not, which is “incompatible with the proper discharge of official duties” If an official determines that he or she cannot be objective about a decision because of a financial or personal interest, the official may choose to abstain from participating in discussions or discussions and votes on a particular project. You may wish to consider this policy in determining whether or not to participate in these Council decisions on funding projects which could potentially use Miracle Recreation equipment, even though a determination has been made that there is no legal conflict of interest. It should be emphasized, however, that this is a policy, not a law, and does not have the force and effect of law.

CONCLUSION

Because these Council decisions to fund park projects are preliminary funding items, with no known connection at this time to Miracle Recreation, you do not have a conflict of interest that would disqualify you from participating in these decisions under the Act or Section 1090. Future Council actions related to tot lot renovations may involve different facts, and should be analyzed on a case by case basis. Please feel free to call me if you have any further questions about this matter.

CASEY GWINN, City Attorney

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By

Lisa A. Foster
Deputy City Attorney

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